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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. ~~278~~ 25

WILLIAM PRESSER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONER

On Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit.

EDWIN KNACHEL,
JOHN G. CARDINAL,
ROBERT E. FREED,
1706 Union Commerce Bldg.,
Cleveland, Ohio,
Attorneys for Petitioner.

MARSHMAN, HORNBECK, HOLLINGTON,
STEADMAN & MCLAUGHLIN,
Of Counsel.

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BRIEF OF PETITIONER

On Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit.

OPINION BELOW.

The opinion of the Court of Appeals is set forth at page 404 of the Transcript of Record, and is officially reported at 292 F. 2d 171 (6th Cir. 1961).

The memorandum opinion of the District Court denying Petitioner's motion for judgment of acquittal or for a new trial appears at page 326a of Transcript of Record. The memorandum opinion of the District Court has not been officially reported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) to review the judgment of the Court of Appeals affirming the Petitioner's conviction for violation of 18 U. S. C. § 1505.

On July 6, 1961, the Court of Appeals entered its judgment against Petitioner. No petition for rehearing was filed on behalf of Petitioner.

On August 1, 1961, petition for certiorari was filed on behalf of Petitioner.

Certiorari was granted October 23, 1961 (*Presser v. United States*, ____ U. S. ____, 7 L. Ed. 2d 86).

Printed transcript of record transmitted by the Clerk of the Supreme Court to counsel for Petitioner on December 18, 1961.

STATUTES INVOLVED.

U. S. Const. amend. V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Title 28 U. S. C. § 1254(1).

§ 1254. Courts of appeals; certiorari; appeal, certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * * (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * * June 25, 1948, c. 646, 62 Stat. 928.

Title 18 U. S. C. § 1505.

§ 1505. Influencing or injuring witness before agencies and committees.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein, or;

Whoever corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 770.

Title 2 U. S. C. § 190b.

§ 190b. Authority of Senate standing committees and subcommittees; sitting while Senate or House in session.

(a) Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to

hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems available. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding 25 cents per hundred words. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session. Aug. 2, 1946, c. 753, Title I, § 134(a), (c), 60 Stat. 831, 832.

Rules of Procedure for the Senate Select Committee on Improper Activities in the Labor or Management Field. (Gov. Ex. 6; R. 313a.)

* * * * *

4. Subpenas for attendance of witnesses and the production of memoranda, documents, and records shall be issued by the Committee Chairman or by any other Member of the Committee designated by him in writing.

* * * * *

QUESTIONS PRESENTED FOR REVIEW.

I. Whether the Petitioner could have obstructed or impeded, or endeavored to obstruct or impede, the due and proper exercise of the Committee's power of inquiry in view of the fact that the subpoena duces tecum, the alleged violation of which is the basis of the Petitioner's indictment and conviction, was not issued in accordance with Title 2 U. S. C. § 190b(a), the Rules of Procedure for the Senate Select Committee on Improper Activities in the Labor or Management Field, paragraph 4, and Senate Resolution 74, Eighty-fifth Congress.

II. Whether the testimony of the Committee Chairman was admissible against the Petitioner for any purpose advanced by the Government at the trial.

III. Whether the Petitioner could have obstructed or impeded, or endeavored to so obstruct or impede, the due and proper exercise of the Committee's power of inquiry when the Government's evidence fairly discloses that the Committee obtained the information it is claimed it sought without obstruction or impediment.

IV. Whether the misconduct of the Government's counsel in his final argument to the jury deprived the Petitioner of his right to a fair and impartial trial.

V. Whether the evidence presented against the Petitioner can sustain a conviction for the violation of Title 18 U. S. C. § 1505.

STATEMENT OF THE CASE.

William Presser, the Petitioner, a lifelong resident of Cleveland, Ohio, has been affiliated with the labor movement for 34 years (R. 220a). He became associated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Teamsters Union") in 1951, and became President of its Joint Council 41 in 1953 (R. 220a).

Joint Council 41 is an administrative unit of the Teamsters Union and is composed of affiliated local unions within its jurisdiction in the State of Ohio. Joint Council 41 is one of three such councils in the State of Ohio, and together these councils compose what is known as the "Ohio Conference of Teamsters" (R. 196a, 221a, 222a).

On March 23, 1960, the Petitioner was indicted and charged with the violation of the provisions of Title 18 U. S. C. § 1505 (R. 5a), to which indictment the Petitioner entered his plea of not guilty on April 1, 1960 (R. 1a). On May 31, 1960, the case was called for trial before Judge Paul Jones and a jury in the United States District Court for the Northern District of Ohio, at Cleveland.

On June 6, 1960, the jury returned its verdict of guilty (R. 3a). On June 24, 1960, the Petitioner's alternative motion for judgment of acquittal or a new trial was overruled by the trial court (R. 4a), and the Petitioner was sentenced to eight months confinement which was not to run concurrently with any sentence imposed by any other court (R. 4a).

On July 1, 1960, the Petitioner perfected his appeal to the United States Court of Appeals for the Sixth Circuit (R. 4a), which court, on July 6, 1961, affirmed the judgment of the district court (R. 408).[1]

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[1] *United States v. Presser*, 292 F. 2d 171 (1961).

On August 1, 1961, Petitioner filed his petition for certiorari which this Court granted on October 23, 1961.[2]

On March 21, 1958, Joint Council 41 was served with a subpoena duces tecum, dated March 19, 1957 [sic 1958] (Gov. Ex. 9; R. 313a). This subpoena was served upon William Presser, the Petitioner herein (R. 85a, 89a), by Walter J. Sheridan, an investigator for the Senate Select Committee on Improper Activities in the Labor or Management Field (hereinafter referred to as "Committee") (R. 56a).

The subpoena purported to require Joint Council 41 to produce forthwith before the Committee all of its records for the nine year period from January 1, 1949, to January 1, 1958, including cash receipts, disbursement books, ledgers, cancelled checks, check stubs, day books, paid bills, records of loans, correspondence files, memoranda, pay roll records, minutes of meetings, records of all bank accounts, opened and closed, and any other records relating to Joint Council 41 (R. 57a; Gov. Ex. 9; R. 313a).

Following the service of the subpoena upon Joint Council 41, an arrangement was effected between Committee personnel in the Field Office at Cleveland, Ohio, and Mr. Cozza and Miss Steuer, accountants and attorneys for Joint Council 41 (R. 59a), whereby the documents demanded by the subpoena were delivered to the Committee personnel in Cleveland (R. 24a, 25a, 59a, 60a, 63a, 86a, 87a, 147a). When these documents were delivered to the Cleveland Field Office, Mr. Reibesell, a government accounting office employee on loan to the Committee and stationed at Cleveland, gave Mr. Cozza a receipt for the delivered documents and addressed any questions concern-

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[2] *Presser v. United States*, ___ U. S. ___, 7 L. ed. 2d 86 (1961).

ing those documents to Mr. Cozza (R. 86a, 147a; Deft. Ex. B; R. 319a). This practice continued from shortly after the service of the subpoena upon Mr. Presser to August, 1958 (R. 86a).

In late August of 1958, Walter J. Sheridan was informed by the Committee counsel that the Teamsters Union had established an "Anti-Corruption Commission" (R. 61a). In view of the fact that ex-Senator Bender had been appointed to this Commission, Mr. Sheridan was sent to Ohio by the Committee counsel to attempt to establish whether there had been an association between ex-Senator Bender and the Teamsters Union (R. 62a). In pursuance of these instructions (R. 62a), Walter Sheridan went to the office of Joint Council 41 on September 9, 1958.

On this date Mr. Sheridan talked to the Petitioner and told him that he wanted to look through certain files (R. 63a). Mr. Presser referred Mr. Sheridan to his secretary, and the files of several filing cabinets were made available to Mr. Sheridan (R. 66a). Of the many files that Mr. Sheridan examined, he noticed in one of these files an envelope marked "Xmas List," and the envelope contained a voucher from the Rudolph Deutsch Company and a sheet of yellow paper with a list of names thereon (R. 68a). Eight names appeared on the face of the voucher and these same names also appeared on the sheet of yellow paper along with some other names (R. 68a). From all of the files examined by Mr. Sheridan, he made notes concerning only the voucher and the sheet of yellow paper (R. 68a, 69a; Gov. Ex. 13; R. 317a). Mr. Sheridan's notes contained all of the details that were on the invoice and indicated that in addition to the names listed on the invoice other names were listed on the yellow sheet of paper (R. 69a).

When Mr. Sheridan was ready to depart the office of Joint Council 41 he stated to Mr. Presser that he would like to take four of the several files from the filing cabinet, one of which contained the invoice from the Rudolph Deutsch Company and the sheet of yellow paper (R. 70a).

Mr. Sheridan testified that Mr. Presser did not want to allow the files to be taken from the office at that time because he wanted to have photostats made of them. To this Mr. Sheridan agreed, and when he returned on September 13, 1958, to get the files they had not been photostated. Mr. Sheridan again examined the files and discovered that the invoice had been torn and defaced and the yellow sheet of paper was missing (R. 71a, 72a).

Mr. Presser testified upon this same matter that he was agreeable to permitting Mr. Sheridan to retain those files which Mr. Sheridan indicated he wanted. However, Mr. Presser felt that Mr. Sheridan should give a receipt for what he was taking from the office of Joint Council 41 (R. 227a) in conformity with the practice established between Mr. Cozza and the Field Office (R. 147a). Because of the late hour, Mr. Sheridan stated that he would be unable to give a receipt for all of the matters that he was taking, but either Mr. Sheridan or Mr. Presser suggested photostating the contents of the files, to which there was apparent agreement. When Mr. Sheridan returned on September 13, he found the files were not photostated and he again examined the contents. In a show of temper, Mr. Sheridan accused the Petitioner or some teamster of destroying a piece of paper, and in the same show of temper departed with the files without first giving any receipt to the Petitioner therefor (R. 231a, 232a).

Emphasis has been supplied throughout this brief by bold face type.

SUMMARY OF ARGUMENT.

I.

The Petitioner was not in violation of any provisions of Title 18 U. S. C. § 1505 because the Committee was not in the due and proper exercise of its power of inquiry pursuant to Senate Resolutions 74, 88 and 221.

The subpoena duces tecum, served upon the Petitioner and directing Joint Council 41 to produce forthwith before the Committee the documents named in said subpoena, was not issued pursuant to Title 2 U. S. C. § 190b (a), Senate Resolution 74 (Gov. Ex. 5-C; R. 312a), and paragraph 4 of the Rules of Procedure, unanimously adopted by the Committee (Gov. Ex. 6; R. 313a). *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942).

A subpoena duces tecum signed by the Committee Chairman, but otherwise executed and directed by a Committee employee, is an unlawful delegation of the power of compulsory process by the Committee. Under such circumstances the Committee was not engaged in the due and proper exercise of the power of inquiry under its charter and, therefore, cannot invoke the criminal provisions of Title 18 U. S. C. § 1505 against the Petitioner.

II.

The testimony of Senator McClellan, admitted into evidence against the Petitioner, cannot be justified as probative evidence supporting any material element of the charges against the Petitioner. The testimony of Senator McClellan was erroneously admitted into evidence against the Petitioner to support the issue of **pertinency**. Both aspects of pertinency are questions of law to be determined by the court. However, during the Petitioner's trial, the court treated pertinency generally as a question

of fact and then permitted Senator McClellan to usurp the function of the jury by stating that the proper names on the demanded documents were pertinent to the question under inquiry by the Committee. *Braden v. United States*, 365 U. S. 431 (1961); *Watkins v. United States*, 354 U. S. 178 (1957); *Sinclair v. United States*, 279 U. S. 263 (1929).

Senator McClellan was permitted to read the Committee "findings" into the record as evidence that the Petitioner had **knowledge** of the relevancy or pertinency of the proper names on the demanded documents to the question under inquiry by the Committee. The hearings from which the "findings" were made involved matters which did not concern the Petitioner and were concluded before the Petitioner was served with the subpoena for the violation of which he has been indicted and convicted under Title 18 U. S. C. § 1505.

Under the circumstances of this case the knowledge chargeable against the Petitioner must be embodied in the subpoena. *United States v. Pitotto*, 267 Fed. 603 (Ore. 1920).

The **proper names** listed on the demanded documents were not pertinent or relevant to the inquiry then being conducted in the exercise of the Committee's due and proper power of inquiry. Nor did the names bear a reasonable relation to the subject matter of the Committee's inquiry. Therefore, the Petitioner did not obstruct or impede the due and proper exercise of the power of inquiry under which the Committee was conducting its investigation. *Deutch v. United States*, U. S. , 6 L. ed. 2d 963 (1961).

Senator McClellan was permitted to read the testimony Walter Sheridan gave before the Committee relative to

Sheridan's visit to the offices of Joint Council 41. The purpose of Senator McClellan's testimony in this regard was to permit the Senator "to testify as to their pertinency" (R. 35a) before these matters were placed in evidence directly through the testimony of Sheridan himself. In view of the conflict in the testimony between the Petitioner and Sheridan, the prior corroboration of Sheridan's testimony deprived the Petitioner of a fair and impartial trial. *Mellon v. United States*, 170 F. 2d 583 (5th Cir. 1948).

III.

The testimony of Senator McClellan fairly discloses that the interest of the Committee regarding the Christmas gifts given by Joint Council 41 was confined to whether or not union funds were used for such purpose. Inasmuch as the Committee had received the documents of Joint Council 41 disclosing this fact, the proper names were not relevant or pertinent to the question under inquiry by the Committee.

IV.

The repeated references by Senator McClellan during his testimony to criminals, racketeers and unsavory characters provided a background for the Government's prosecutor to distort and misstate the testimony against the Petitioner, and thus deprive the Petitioner of a fair and impartial trial. *Watkins v. United States*, 354 U. S. 178 (1957); *McNabb v. United States*, 318 U. S. 332 (1943).

V.

The Government's evidence does not disclose that the Committee was within the due and proper power of inquiry under its charter. Nor does the Government's evi-

dence disclose with any degree of particularity the question or the subject matter then under inquiry by the Committee. Therefore, the Government has failed to establish the material elements of the offense set forth in Title 18 U. S. C. § 1505.

ARGUMENT.

I.

The indictment upon which the Petitioner stands convicted (R. 5a) charges that from January 30, 1957, through January 31, 1959, the Committee was duly conducting its investigation pursuant to the authority of Senate Resolutions 74, 88 and 221 of the 85th Congress.

The indictment further charges that **pursuant to the Rules of Procedure adopted by the Committee** on February 5, 1957, and in accordance with Senate Resolutions 74, 88 and 221, **the Chairman or any other Member of the Committee designated by him in writing** was authorized and empowered to issue subpoenas for the attendance of witnesses and the production of documents before the Committee.

In accordance with the Senate Resolutions and the Rules of Procedure a subpoena, in terms as set forth in the indictment, was **duly issued** and served upon Teamsters Joint Council 41. On or about, and between, September 9, 1958, and September 13, 1958, the Petitioner unlawfully, wilfully and knowingly did corruptly influence, obstruct and impede **the due and proper exercise of the power of inquiry under which the Committee was conducting its investigation** in that the Petitioner:

> a. altered, defaced and tore, and partially destroyed, concealed and withheld from the Committee a certain invoice of Joint Council 41 and,

b. concealed and withheld from the Committee an envelope marked "Christmas List," and a memorandum containing a list of names with various items of merchandise or amounts of money annexed thereto.

These documents, the indictment charges, bore a reasonable relation to the subject matter of the Committee's inquiry and were relevant to it, and were required to be produced in accordance with the subpoena served upon Joint Council 41.

The Government's evidence disclosed that in the indictment and conviction of the Petitioner for the violation of Title 18 U. S. C. § 1505 there has been not only a failure of any insistence upon procedural regularity, there has been a complete lack of such regularity.

Senate Resolution 74 established the Committee, and it provides in part (Gov. Ex. 5-C; R. 312a):

"* * * SEC. 2(a) **The select committee shall consist of 8 members * * *, and shall, * * * adopt rules of procedures not inconsistent with the rules of the Senate.** * * *

"SEC. 4. **For the purposes of this resolution the select committee is authorized as it may deem necessary and appropriate to * * * (4) require by subpena or otherwise the attendance of such witnesses and production of such correspondence, books, papers, and documents; * * *"**

Title 2 U. S. C., § 190 b (a) provides in part:

"Each standing committee of the Senate, including any subcommittee of any such committee, is authorized * * * to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, * * * as it deems advisable. * * *"

Paragraph 4 of the Rules of Procedure of the Senate Select Committee on Improper Activities in the Labor or Management Field (Gov. Ex. 6; R. 313a) provides:

> "Subpenas for attendance of witnesses and the production of memoranda, documents, and records **shall be issued by the Committee Chairman or by any other Member of the Committee designated by him in writing.**"

Senator McClellan testified that under the resolution establishing the Committee and under the rules of the Committee itself, the Chairman had the authority to issue subpoenas (21a, 22a).

Walter J. Sheridan, an investigator for the Permanent Subcommittee on Investigations of the Government Operations Committee of the Senate (R. 55a), testified as follows (R. 84a) concerning the issuance of the subpoena (Gov. Ex. 9; R. 314a) served upon the Petitioner and directed to Joint Council 41:

> "Q. And your recollection is that it [subpoena] was prepared here? A. No, my recollection is that the chances are it was prepared here. I can't say for certain that it was.
>
> **Q. And the chances are that if it was prepared here you filled in a subpoena signed by Senator McClellan that was blank, isn't that correct? A. That would be correct.**"

There is no evidence in the record that the Chairman or any Committee Member, upon written authority from the Chairman, issued or authorized the issuance of the subpoena (Gov. Ex. 9; R. 314a) that the Petitioner is charged with violating. The exercise of the Committee's compulsory process through the "issuance" of its subpoena demanding the production of documents cannot be satisfied by the Chairman's signature attached to blank forms. Certainly the Committee, in the exercise of its delegated

subpoena power from the Senate, must also determine the purpose for which documents shall be demanded and the institution or the person to whom its power of compulsory process shall be directed. *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942); *Application of Barnes*, 116 F. Supp. 464 (N. D. N. Y. 1953), *rev.* 219 F. 2d 137 (2d Cir. 1955), *aff'd. sub nom. United States v. Minker et al.*, 350 U. S. 179 (1956).

The only evidence in the record concerning the "issuance" of the subpoena is that of the Committee investigator, Walter J. Sheridan (R. 84a).[3]

To permit an investigator, or any employee of the Committee, to determine to whom a subpoena shall be directed and to determine further what documents shall be demanded and for what purpose, under the color of compulsory process of the Committee, is a redelegation of the Committee's delegated power of compulsory process and a complete abdication of the Committee's power to investigate. Under such circumstances, the Committee is not serving as the responsible representative of Congress in collecting information for a legislative purpose, nor is it exercising its delegated power of compulsory process as an aid to its right to investigate for which it alone must be responsible, as required by the limitations of its authorizing resolutions and the provisions of its Rules of Procedure. *Watkins v. United States*, 354 U. S. 178 (1957).

The indictment charges that the subpoena was issued in accordance with Senate Resolutions 74, 88 and 221 and the Rules of Procedure adopted by the Committee.

When the testimony of the Committee investigator disclosed for the first time at the trial the manner in which

[3] Although Sheridan admits only that the "chances are" the subpoena was prepared and issued by the Committee employees in Cleveland, that practice is admitted by the Government (Brief of United States in Opposition to Petition for Certiorari, p. 15).

the subpoena was "issued," the Petitioner moved the trial court to quash the subpoena (R. 212a) and followed by a motion for an entry of judgment of acquittal (R. 215a). Both of these motions were made at the close of the Government's case, and both motions were overruled.[4]

The United States Court of Appeals for the Sixth Circuit disposed of the Petitioner's contention that the committee had failed to invoke its power of compulsory process in the same manner as did the trial court (R. 407).[5]

Certainly those limitations upon the use of the compulsory process in furtherance of a legislative purpose advanced in *Watkins v. United States*, 354 U. S. 178 (1957), will have been totally ignored, if not openly flouted, if the conviction of the Petitioner is permitted to stand. Neither the view of the trial court nor that of the Court of Appeals can be reconciled with the view expressed by this Court in *Watkins v. United States supra*, at p. 215.

There is no precedent in the entire history of judicial decisions controlling the use of subpoena power by congressional investigating committees, and there is no justification in the light of the rights of the Petitioner to be protected in this lawsuit, to warrant an inference that the Committee had a right to delegate arbitrarily and indiscriminately its subpoena power to an investigator or employee of the Committee.

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[4] Regarding the validity of the subpoena, the trial court "guessed" it was valid (R. 213a). In overruling Petitioner's motion for judgment following the verdict of the jury and the entry of judgment of conviction, the trial court stated, "It has not been shown that there was anything unlawful in the method used by the Committee in issuing subpoenas duces tecum" (R. 327a).

[5] The court stated, "* * * We agree with the trial court that there was nothing unlawful in the method used by the Committee in issuing the subpoena duces tecum. Moreover, appellant knew that the documents in question were wanted by the Committee, and, in such a case the existence of a valid subpoena is not vital to the charge of the obstruction of justice. * * *" (R. 407).

The abuses attendant upon the Committee's arbitrary delegation of its power of compulsory process to its employees were extensively considered in *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942).[*]

It is the Petitioner's contention that a subpoena duces tecum to be valid must be issued in accordance with the provisions of Title 2 U. S. C. § 190b, Senate Resolution 74, and the Rules of Procedure adopted by the Committee, and that a validly issued subpoena is the *sine qua non* to the invocation of the Committee's power of compulsory process. *Cudahy Packing Co. v. Holland, supra.* The *sine qua non* to the conviction of Petitioner for the violation, obstruction or impediment of the compulsory process of the Committee as laid in the indictment is the issuance of a valid subpoena by the Committee. *McNabb v. United States*, 318 U. S. 332 (1943); *United States v. Pitotto, et al.*, 267 Fed. 603 (D. Ore. 1920).

If the Committee failed to comply with the provisions of Title 2 U. S. C. § 190b(a) and its own Rules of Procedure, it cannot be said that the Committee was in the due and proper exercise of the investigative power granted by Senate Resolutions 74, 88 and 221. If the Committee was not in the due and proper exercise of its investigative power, the Petitioner cannot be said to have obstructed or impeded, or endeavored to obstruct or impede, the due and proper administration of the law under which the Committee was conducting its investigation.

Although the contention of the Petitioner is directed to the complete lack of procedural regularity by which

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[*] At p. 363: "* * * It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. * * * All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency."

The Committee has attempted to establish its right to investigate through the power of compulsory process, it is nonetheless substantial when it is considered that the Petitioner is deprived of his liberty for the violation of a criminal statute. The Petitioner's position in this regard is not unlike countless other accuseds whom the courts have rescued from the arbitrary exercise of power in contravention of the accuseds' rights.

Such arbitrary exercise of power has proven fatal to convictions under other, but analogous criminal statutes. *Christoffel v. United States*, 338 U. S. 84 (1949).[7]

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[7] *United States v. Bufalino*, 285 F. 2d 408, 416 (2nd Cir. 1960): "* * * Falsehoods given before non-judicial inquiries are not encompassed within 18 U. S. C. § 1503, the federal obstruction of justice statute, *United States v. Seoratow*, D. C. W. D. Pa. 1956, 137 F. Supp. 620. * * *"

Haili v. United States, 260 F. 2d 744, 745 (9th Cir. 1958): "Speaking generally, it might be said that many matters other than proceedings pending in court have to do with the administration of justice. Thus, the gathering of evidence and procuring of statements of witnesses by the Federal Bureau of Investigation is in a general way a functioning of the federal government with respect to the administration of justice. Yet it has been held that one who threatens to kill another if he gives any information to the Federal Bureau of Investigation cannot be found guilty under § 1503, Title 18. * * * Also, in a general way, it can be said that the supervision of a convicted prisoner in a penitentiary is a part of the administration of justice if that term is given a very wide meaning. We would be surprised, however, if it were held that conduct designed to encourage a prisoner to escape from a penitentiary could be punished under § 1503."

Sparks v. United States, 90 F. 2d 61, 63 (6th Cir. 1937): "The validity of the search warrant is always relevant on the question of obstructing an officer in the performance of his duties. Resistance to a search carried out under an invalid warrant is not illegal. * * *"

Whipp v. United States, 47 F. 2d 496 (6th Cir. 1931): "* * * The chief meritorious question presented is, not whether a conspiracy existed to offer forceable resistance to such officer * * *, but * * * whether such employee was, at the time, in the lawful performance of his federal duties, for it is only when the resistance is offered 'in the execution of' such duties that a crime results."

(Continued on following page)

Those inferior federal courts which have dealt with this question have had no difficulty in discerning the vices

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(Continued from preceding page)

Rosner v. United States, 10 F. 2d 675, 676 (2nd Cir. 1926): "* * * But convenience does not rule, and we find no warrant of law for a United States attorney asserting that he administers justice when he writes notes, or for using this statute to give to his notes or verbal requests the quality of process."

Cooper v. United States, 297 Fed. 483, 484 (3rd Cir. 1924): "* * * The offence denounced by the statute has two essential ingredients—seizure of merchandise and rescue of merchandise seized. But there is more in it than this. There must be an unlawful rescue of merchandise lawfully seized * * * hence, lawful seizure is not only an ingredient preliminary to an unlawful rescue but it is a prerequisite. And the lawfulness of the seizure must be shown. * * *"

Salata v. United States, 286 Fed. 125, 126 (6th Cir. 1923): "It is clear from the uncontradicted testimony of the federal prohibition agent, Beilstein, that this search warrant was not issued by anyone having authority to issue the same, nor, as required by statute, upon probable cause, supported by affidavit."

United States v. Scoratow, 137 F. Supp. 620, 621, 622 (W. D. Penna. 1956): "* * * There appears to be no case which holds that interference with witnesses in an investigation being conducted by the Federal Bureau of Investigation, or any similar instrumentality of the government, violates section 1503, or any of its predecessor sections.

Section 1503 is a criminal statute, and as such must be strictly construed. It provides that acts which interfere with the 'due administration of justice' constitute offenses under it. * * * The Federal Bureau of Investigation is an investigating rather than a judicial arm of the government. It does not 'administer justice' within the meaning of section 1503."

In re Pacific Telephone & Telegraph Co., 38 F. 2d 833, 836 (N. D. Calif. 1930): "What I have said concerning the lack of statutory authority for the issuance of a subpoena by a commissioner in aid of an application for a search warrant is probably sufficient to establish the fact that the subpoena in the instant case is void, and that respondent cannot be held in contempt for refusing to obey it. * * *"

United States v. Pitotto, et al., 267 Fed. 603, 604 (D. Ore. 1920): "With such insufficient showing, it follows that the warrant issued by the commissioners was void, and did not authorize the revenue officers to make the search and seizure contemplated. It is only when the officer resisted is authorized by valid warrant to make search and seizure that the statute under which the indictment is preferred may be invoked."

attendant upon arbitrary and indiscriminate delegation of the subpoena power, and have required strict compliance by the committees with the authority of their organization. *Ex parte Frankfeld*, 32 F. Supp. 915 (D. C., 1940);[8] *Application of Barnes*, 116 F. Supp. 464 (N. D. N. Y.), (1953), *Rev.* 219 F. 2d 137 (2d Cir. 1955), aff'd *sub nom. United States v. Minker et al.*, 350 U. S. 179 (1956);[9] *United States v. Olson*, 134 F. Supp. 481 (E. D. N. Y., 1955).[10]

II.

The testimony of Senator McClellan was offered by the Government and was sought to be justified on the ground that such testimony was:

A. Evidence that the question under inquiry by the Committee was the due and proper exercise of the power of inquiry under which the Committee was conducting its investigation. (R. 42a, 45a, 46a, 335.)

B. Evidence that the **proper names** allegedly listed on the sheet of paper and the Deutsch invoice were pertinent or relevant to the question under inquiry by the Committee. (R. 41a, 45a, 46a, 335.)

C. Evidence that the Petitioner had knowledge that the sheet of paper and the Deutsch invoice bore a reasonable relation to the subject matter of the

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[8] At p. 916: "* * * Congress intended to place the responsibility upon the committee itself, and it has prescribed what proceedings may be had when the committee has reported to the Congress— * * *."

[9] 116 F. Sup. 464, 467 "* * * the subpoena power must remain within the bounds of the legislative grant, nor overreach the authority granted by Congress, and in investigatory matters should be conferred in express and explicit terms for that purpose. In my own judgment, subpoenas should not issue upon hit or miss legal grounds."

[10] At p. 482: "That which took place on August 23, 1951 was not a hearing before the Congressional Committee, no member of which was present, but consisted of inquiries made by investigators in pursuit of their authorized calling. * * *"

Committee's inquiry and were relevant to it. (R. 42a, 335.)

D. Evidence to corroborate the testimony of Walter J. Sheridan, whom the Government anticipated producing later in the trial (R. 35).

The testimony of Senator McClellan to which objection was taken cannot be justified for any purpose in the trial of this case. The real and substantial reason for producing McClellan was to attempt to construct a basis for the indictment of the Petitioner, which did not exist in fact at the time of the indictment, and to vouch for the truth of the testimony of the chief witness the Government was to produce subsequently during the course of the trial.

A.

The Committee was established on January 30, 1957, for one year (Gov. Ex. 5-C; R. 312a), and on January 27, 1958, the life of the Committee was extended to January 31, 1959 (Gov. Ex. 5-A; R. 309a). To these matters the Senator testified, and through him Senate Resolutions 74 and 88 (Gov. Exs. 5-C and 5-A; R. 312a; R. 309a) were introduced (R. 18a). Although it seems that it would have been unnecessary to introduce Government's Exhibits 5-A and 5-C through the Senator, it is not now being questioned nor is it assigned as a part of the error of the introduction of the Senator's testimony.

However, when the Government attempted to proceed further and elicit from the Senator what was the authority and scope of the duties of the Committee, the Petitioner objected repeatedly (R. 19a, 20a). Over these objections the Senator was permitted to testify, and, although he stated "these resolutions speak for themselves" (R. 19a), he was allowed to continue by paraphrasing Senate Resolution 74 which established the Committee (R. 19a).

Objections were interposed on behalf of the Petitioner to any further questioning of the Senator regarding particular acts and practices the Committee had investigated pursuant to its authorizing resolutions (R. 20a). These objections were overruled on the ground, apparently, that the investigations the Committee had conducted were material to the case and the investigative hearings were matters of public record (R. 20a).

Even though such hearings did not involve or concern the Petitioner, were not conducted in the presence of the Petitioner, and the Committee investigators who testified before such hearings were not subject to cross-examination (R. 52a), the Senator was permitted to discourse upon past investigations of other persons and other matters (R. 31a-38a, 42a-44a) and to state the Committee's so-called findings with respect to these hearings.

The Petitioner conceives the law to be that in these matters wherein federal courts are called upon to adjust the interests of the Government with the rights and privileges of its citizens, the question of relevancy and pertinency is **twofold.**

First, the subject under inquiry by the Committee must be relevant or pertinent to and within the scope of authority under which the particular investigation is being held. *Deutch v. United States* U. S. , 6 L. ed. 2d 963 (1961), *Barenblatt v. United States*, 360 U. S. 109 (1959); *Watkins v. United States*, 354 U. S. 178 (1957).

Second, the particular questions asked or the particular documents demanded must be relevant or pertinent to the subject under inquiry by the Committee. *Deutch vs. United States, supra; Barenblatt v. United States, supra; Watkins v. United States, supra.*

Although the Petitioner recognizes that "pertinency" is not made specifically an element of the offense of Title

18 U. S. C. § 1505, "pertinency" does become a material element of the crime if, as here, an individual is charged with obstructing or impeding the due and proper power of inquiry of a congressional investigating committee. *Deutch v. United States*, __ U. S. __ 6 L. ed. 2d 963 (1961); *Watkins v. United States*, 354 U. S. 178 (1957).[1] "The Government does not contend that no such element is necessary to prove obstruction of justice."[2]

In *Watkins v. United States, supra*, at pages 206 and 214 the court unmistakably differentiated between the concept of relevancy or pertinency in the two instances above referred to. Later the same differentiation was made in *Deutch v. United States, supra*.

The question of the relevancy or pertinency of the subject under inquiry by the Committee to the scope of authority under which the particular investigation is being held (referred to as jurisdictional pertinency in *Watkins v. United States, supra*) must be determined by the trial court as a matter of law; and the submission of this question, together with evidence thereof, to the jury is prejudicial error. *Deutch v. United States, supra; Watkins v. United States, supra*. Whether the subject under inquiry is within the scope of authority of the Committee (jurisdictional pertinency) must be determined by the court from the resolution establishing the Committee. If rele-

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[1] If there is any distinction between the specifically stated elements of the crime under Title 18 U. S. C. § 1505 and "pertinency" that distinction has been completely obliterated during the course of this litigation by the prosecuting attorney (R. 35a, 37a); the trial court (R. 35a, 36a, 37a, 294a, 296a, 304a, 326a, 327a); the Committee Chairman (R. 45a) and the Department of Justice (Brief in Opposition to Pet. for Cert. p. 20; Brief of Plaintiff-Appellee, p. 20).

United States v. Siegel, 152 F. Supp. 370 at 374 (S. D. N. Y. 1957), *aff'd* 263 F. 2d 530 (2nd Cir. 1959), *cert. den.* 359 U. S. 1012.

[2] Brief of Plaintiff-Appellee, p. 20.

vancy or pertinency cannot be established in this manner, the Government has failed to establish a vital element of the offense charged against the Petitioner. *Watkins v. United States, supra; United States v. Rumely*, 345 U. S. 42 at 44 and 45 (1953).

The trial court at no point during the trial in the instant case made any determination that the subject under inquiry by the Committee was relevant or pertinent to the scope of the Committee's authority under which the particular investigation was being held.

The trial court, on the other hand, admitted the testimony of Senator McClellan as evidence of such relevancy or pertinency and submitted the issue of jurisdictional pertinency to the jury for its determination as a matter of fact. (R. 294a, 296a.)

The testimony of Senator McClellan was wholly inadmissible to determine the issue of jurisdictional pertinency. *United States v. Rumely, supra.* Therefore, the admission of the Senator's testimony, combined with the court's failure to determine the issue of jurisdictional pertinency as a matter of law, not only confused this issue in the minds of the jury, but deprived the Petitioner of his right to have a material element of the offense with which he was charged determined as a matter of law. *Deutch v. United States, supra; Watkins v. United States, supra; United States v. Rumely, supra.*

B.

To support the charges made against the Petitioner, it was incumbent upon the Government to prove that the proper names on the documents demanded, which documents were allegedly withheld or mutilated, were relevant or pertinent to the subject under inquiry by the Committee.

Again, the determination as to whether the **proper names** allegedly listed upon the documents demanded were relevant or pertinent to the subject under inquiry by the Committee must be determined by the trial court as a matter of law. *Barenblatt v. United States, supra; Watkins v. United States, supra; United States v. Rumely, supra; Sinclair v. United States*, 297 U. S. 263 (1929).

The trial court failed in any manner to make a determination as to whether the names listed upon the documents demanded were relevant or pertinent to the subject under inquiry by the Committee and permitted Senator McClellan, over the repeated objections of Petitioner, to state that in his opinion the proper names on the demanded documents were relevant or pertinent to the Committee's inquiry (R. 44a-47a). Upon this testimony from the Senator the trial court submitted the issue of the pertinency or relevancy of the proper names on the demanded documents to the subject under inquiry by the Committee to the jury for its determination as a matter of fact (R. 294a).[3]

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[3] In his charge, the trial court commented upon the testimony of Senator McClellan and the "elements of the offense" the Government was required to establish. The court then charged the jury, "If the Government establishes these facts in the manner I shall instruct you it is required to do, and as charged in the indictment, its case would be made out. It is essential that each element of the offense charged must be established in the manner stated, to warrant a verdict of guilty."

In overruling the Petitioner's objections to the introduction of testimony by Senator McClellan, the trial court stated: "Well, there is some merit to it. Of course the Government must prove that these matters were pertinent to their inquiry, that they bore a reasonable relation to the matter under investigation, and that is rather difficult to prove except in the way that it is being done.

"That was one of the elements of the offense that these were matters which the committee had under investigation and they were relevant and pertinent to their inquiry and that they were entitled to the records and papers which are the subject of this lawsuit in connection with that inquiry. I assume that is the basis?" (R. 35a, 36a.)

The Senator testified that if the sheet of paper and the Deutsch invoice in fact did contain proper names and those names were removed or withheld from the Committee, that fact alone would obstruct the investigation of the Committee because those names were pertinent to the Committee's inquiry (R. 45a, 46a).

The petitioner contends that the question of "relevancy or pertinency" of the names on the demanded documents to the subject under inquiry by the Committee should have been determined by the court as a matter of law. *Braden v. United States*, 365 U. S. 431 (1961); *Watkins v. United States, supra; United States v. Rumely, supra.* In failing to make this legal determination the Court permitted the witness to assume the Court's judicial function. *Rumely v. United States, supra.* The Court completely confounded his office when, after determining that relevancy or pertinency was a matter of fact for the jury (R. 35a-37a), he permitted the Senator, as a witness, to usurp the function of the jury and testify as to the ultimate and conclusive fact which, if the Court's view was correct, should have been submitted to the jury only as a question of fact (R. 45a, 46a).[1]

Not only was the introduction of any testimony by Senator McClellan incompetent to go to the jury to establish that the names on the demanded documents were relevant or pertinent to the subject under inquiry by the Committee, but the substance of the Senator's testimony was highly prejudicial to the petitioner for another reason (R. 42a-44a).

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[1] From the Government's special request to charge before argument (R. 387) it was argued in the Court of Appeals: "The prosecution requested the trial judge to tell the jury that the relevancy of the information sought by the Committee had been established as a matter of law (Appendix, p. 35b), but the trial judge, instead, deemed it a fact question and instructed the jury accordingly (Appendix, pp. 294a, 304a, 326a-327a)." Brief of Plaintiff-Appellee pp. 11, 12.

The Senator was permitted to characterize the individuals whose names (R. 43a, 44a), it is charged, were removed from the invoice by the Petitioner (R. 5a). Following the characterization of the individuals the Senator concluded that if in fact those individuals' names did appear on the invoice the Committee's business would have been obstructed because the Committee would have been deprived of information that was **pertinent** to its inquiry (R. 45a).

Going far beyond what could possibly be viewed as evidence of the relevancy or pertinency of the proper names allegedly listed on the demanded documents to the question under inquiry by the Committee, the Senator was permitted to comment upon and read "special findings and legislative recommendations of the Committee" (R. 25a-28a) from the Committee's Interim Report (Gov. Ex. 7; R. 25a-28a).[5]

After testifying to the legislative recommendations of the Committee, as set forth in the Interim Report, the Senator was permitted to read from and comment upon the Committee's "findings" with respect to "racketeers," "unsavory characters" and "criminals," some of whose names appeared on the Deutsch invoice (R. 41a-45a).

There is no better example of the obliteration of the Petitioner's right to a fair and impartial trial than the morass of confusion that engulfed the use of the Committee's Interim Report as evidence that the proper names on the demanded documents were relevant or pertinent to the subject under inquiry by the Committee.

Upon objection to the use of the Interim Report, the Government's attorney stated one purpose for its admission

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[5] Gov. Ex. 7, the Committee's Interim Report was identified (R. 25a) and received in evidence over objection (R. 28a), but was not submitted to the jury for its deliberations. (R. 213a.)

(R. 42a) and Senator McClellan stated another purpose when questioned by the court (R. 43a). The court, after sustaining the Petitioner's objection, permitted testimony from the report for the limited and particular purpose advanced by Senator McClellan (R. 43a). However, after the testimony from the report was placed before the jury through the Senator (R. 42a-47a) he was permitted to testify that the proper names on the demanded documents were **pertinent** to the Committee's inquiry (R. 45a).

Subsequently, when the Government sought to have the Interim Report submitted to the jury for its deliberations (R. 212a), the Petitioner renewed his objections to the use of the Interim Report (R. 212a). At this point the trial court sustained the objection and refused to permit any portion of the Interim Report to go to the jury because its materiality was "too remote" (R. 213a).

The trial court's duty in these matters is too well settled to warrant any doubt that the admission of the testimony of Senator McClellan was erroneous and prejudicial to the rights of the Petitioner and should not have been submitted to the jury as evidence of **pertinency**. *Sinclair v. United States*, 279 U. S. 263 (1929).

Inasmuch as the Government claims only that the Committee was obstructed in obtaining the **names** listed on the demanded documents (R. 5a), it must prove that those **names** were relevant or pertinent to the question under inquiry by the Committee. *Deutch v. United States, supra, Watkins v. United States, supra.*

The Government not only failed to prove that the **names** were pertinent to any question then under inquiry by the Committee (as more fully appears under Question III, *infra*), but the trial court subjected the Petitioner to the innuendos and insinuations of the Government's evidence by failing to determine pertinency as a matter of

Law. *Braden v. United States*, 365 U. S. 431 (1961); *Sinclair v. United States, supra; Keeney v. United States*, 218 F. 2d 843 (D. C. Cir. 1954); *United States v. Cross*, 170 F. Supp. 303 (D. C. Cir. 1959).

C.

One of the purposes for which the Government desired, (R. 42a). and for which the court permitted, the introduction of the testimony of Senator McClellan was to prove **knowledge** on the part of the Petitioner. Senator McClellan's testimony in this regard was to prove to the jury that the Petitioner had **knowledge** of the question under inquiry by the Committee and that the Petitioner had **knowledge** of the relevancy of the **names** on the Deutsch invoice and the paper to the question then under inquiry by the Committee.

That such was a purpose of the evidence from Senator McClellan is amply disclosed by the argument advanced by the Government to the jury (R. 334a) and by the charge of the court (R. 303a, 304a).[6]

The Government was permitted to cross-examine the Petitioner at length concerning his knowledge of the findings contained in the Committee's Interim Report. The Petitioner testified that he did not know of the Interim Report, had not read it and that it was only through the Government's case that he had "heard" that one of the

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[6] Regarding the testimony of Senator McClellan the Government argued in the Court of Appeals that such testimony may not have been limited to the issue of pertinency, and stated: "Senator McClellan's testimony on these matters is therefore relevant and admissible on the issues of knowledge and motive, independently of the issue of pertinency." Brief of Plaintiff-Appellee, pp. 15, 16.

Regarding the same testimony the Government argued in its Brief in Opposition to Petition of Writ of Certiorari, p. 13: "This line of testimony was not offered to attack petitioner's character but because it was relevant to the questions of pertinency and of petitioner's motive to destroy the papers."

persons listed in the Deutsch invoice was a "known consorter with criminals" (R. 255a, 256a).

The Petitioner testified also that any findings that the Committee had made concerning the Teamsters he read in the newspapers (R. 255a).

The knowledge chargeable to the Petitioner as set forth in the indictment is the knowledge attributable to him through the subpoena (Gov. Ex. 9; R. 314a) served on March 21, 1958 (Indictment, 5a). The knowledge properly chargeable to the Petitioner in this case, which involves only the production of documents, must stem from the Committee's exercise of its compulsory process. (Note 7, Question I, *supra*.) The Government's attorney recognized the source of the Petitioner's knowledge in defining the purpose of the subpoena to the jury (R. 336).

In this regard it should be noted that the hearings which composed the Committee's Interim Report were heard, concluded and compiled prior to the date that Sheridan served his subpoena for Joint Council 41 records upon the Petitioner. The Interim Report, as the Committee's final document, was filed with the Senate on March 24, 1958 (R. 28a).

Rather than being evidence of the Petitioner's knowledge of the question under inquiry by the Committee, the continued reference to and reading from the Committee's Interim Report during the trial and in final argument was a calculated effort to affect the jury in the manner which was recognized and condemned by the court in *Bowers v. United States*, 202 F. 2d 447 at 452 (D. C. Cir. 1953).

D.

Senator John L. McClellan was called as the Government's first witness against the petitioner. Senator McClellan identified Government's Exhibit 8 as Volume 40 of the public hearings conducted by the Committee (R. 34a),

and Volume 40 was introduced into evidence over the objections of the Petitioner (R. 36a). Following the indentification and introduction into evidence of Volume 40, Senator McClellan was permitted to read the testimony of Walter Sheridan given to the Committee on September 17, 1958 (R. 38a, 39a, 40a, 41a).

At the time of trial five reasons were advanced by the Government to justify the Chairman's reading the testimony of a committee investigator. One reason given by the Government's attorney was:

> "* * * Before we get certain matters in evidence directly I would like the Senator to be able to testify as to their pertinency. * * *" (R. 35a.)

Mr. Sheridan, who was in the corridor at the court while Senator McClellan testified, followed the Senator to the witness stand and testified concerning the facts which were allegedly the basis for his testimony before the Committee.

In view of the circumstantial nature of the case presented to the jury by the Government against the Petitioner, the Petitioner respectfully submits that the principle announced in *Mellon v. United States*, 170 F. 2d 583 (5th Cir. 1948) is controlling herein.

In reversing the trial court, the appellate court in the *Mellon* case stated as page 585 of its opinion:

> ". . . **we are forced to the conclusion that the admission of this evidence was prejudicial to Mellon, as tending to bolster the testimony of the witness Edgar, and doubly emphasize his evidence before the jury as against that of the accused.** The general rule is that a witness may not be corroborated or have his sworn testimony reinforced by proof that on previous occasions he has made the same statements as those made in his testimony. * * *."

United States v. Alu, 246 F. 2d 29 (2nd Cir. 1957); *United States v. Keller*, 145 F. Supp. 692 (D. N. J. 1956) uphold the same principle announced in *Mellon v. United States*, *supra*.

III.

That the proper names stated by Sheridan to have been listed on the sheet of paper allegedly withheld or the eight names on the Deutsch invoice allegedly mutilated were not pertinent or relevant to any question under inquiry by the Committee at the time they were allegedly mutilated and withheld was amply disclosed, albeit objectionable, by the testimony of Senator McClellan and that of Investigator Walter Sheridan.

The Government attempted to elicit from Senator McClellan the reason or purpose of Investigator Sheridan's visit to Ohio. The Senator testified that some investigation had been underway in Ohio and after George Bender had been appointed to a Teamster cleanup committee Sheridan "pursued some investigation of the situation by reason of the appointment of this committee" (R. 32a-34a).

Walter J. Sheridan testified that the Committee counsel in late August of 1958 had instructed him to go into Ohio and attempt to establish whether there was an association between George Bender and the Teamsters and the degree of that association. Sheridan came to Ohio in late August of 1958 and pursued those instructions (R. 60a-62a).

The development of the Government's case against the petitioner clearly indicated that Walter Sheridan did not come to Ohio to investigate Joint Council 41, but to determine George Bender's relationship with teamsters in Ohio. It is also clearly indicated that Walter Sheridan was sent by the Committee counsel to get **information**, and

both he and Senator McClellan testified to this fact (R. 45a, 101a). The testimony of both McClellan and Sheridan also disclosed that Sheridan did get the information for which he came to Ohio and that information was obtained by Sheridan on September 9, 1958.

Government's Exhibit 10 (R. 315a) are the notes that Walter Sheridan made concerning his visit to the office of Joint Council 41 on September 9, 1958. Of the many files that were available to Mr. Sheridan, these were the only notes he made of any document or file (R. 69a). The reason Mr. Sheridan gave for making those notes was that he was investigating George Bender (R. 99a).

There are two factors which amplify the fact that Walter Sheridan, as an investigator, was interested in any information he might obtain concerning George Bender, rather than the fact that the documents purportedly required to be produced were the subject under inquiry by the Committee and that the proper names on those documents were pertinent or relevant to that inquiry.

First, the evidence produced by the Government over Petitioner's objection of the retention of George Bender by the Ohio Conference of Teamsters in 1958 clearly verifies Sheridan's interest in George Bender. Second, the testimony of Sheridan as to his knowledge of the establishment of the field office in Cleveland for the local production of documents purportedly required to be produced by the subpoena (R. 25a, 59a, 86a) indicates clearly that Sheridan was not aware what, if any, documents had not been produced by Joint Council 41.

The most conclusive proof that the proper names listed on the documents allegedly mutilated and withheld was the testimony of Senator McClellan.

During the course of the trial the Government's attorney questioned Senator McClellan about the specific

"findings" of the Committee with respect to certain officers of the Teamsters Union whose names appeared upon the Deutsch invoice. After objection by the Petitioner the trial court questioned Senator McClellan concerning the Committee's interest in one officer of the union sending another officer of the union a Christmas gift. Senator McClelland stated to the court that it was not a question of one officer sending another officer a Christmas gift, but was a question of using union dues for such purposes (R. 43a).

The Court of Appeals in the 4th paragraph of its opinion, (R. 406), evaluates Senator McClellan's testimony in this regard as follows:

> "As Senator McClellan testified, the question was not whether an officer of the Union sent a champagne bucket to another officer, but 'it is a question of using Union dues money for such purpose'—and the use of Union dues money was one of the questions the Committee was investigating. * * * We accept this evidence as true on this appeal from a verdict and judgment in favor of the government."

If the testimony of Senator McClellan referred to above and quoted by the Court of Appeals is the true evidence against the Petitioner, it should be abundantly clear that the Petitioner did not and could not have obstructed or impeded the investigation of the question under inquiry by the Committee. Sheridan at all times had the Deutsch invoice which contained the information which Senator McClellan stated interested the Committee (R. 72a; Gov. Ex. 12; R. 316a).

Sheridan had made notes of the proper names claimed to have been on the Deutsch invoice which Senator McClellan testified was not of interest to the Committee (R. 43a).

The testimony of Sheridan and McClellan and the opinion of the Court of Appeals clearly indicate that the Petitioner did not obstruct or impede the Committee in the due and proper exercise of its power of inquiry.

It is not discernible from the Government's evidence what subject the Committee had under inquiry on September 9, 1958, and under any view of the Government's evidence it cannot be said that the Petitioner obstructed or impeded any due and proper exercise of investigative power by the Committee. To obstruct or to impede is to hinder or prevent progress toward a goal or an achievement. Sheridan had fulfilled the purpose for which the Committee counsel instructed him to travel to Ohio late August of 1958, and no act of the Petitioner, or any other person, could have, at the time that Sheridan made the notes contained in Government's Exhibit 10, impeded or obstructed the achievement of Mr. Sheridan's goal.

The record of the events of the Committee with respect to the independent actions of Walter J. Sheridan fully disclose those factors that the Supreme Court found barren in the record of *Barenblatt v. United States*, 360 U. S. 109 at 134 (1959).

IV.

As the trial progressed, what had been characterized by the Government's attorney as a simple case became rather complex by the various attempts to justify the admission of evidence which, as the petitioner had contended, was erroneously admitted and prejudicial to the Petitioner. During the Government's attorney's final argument repeated references were made to "criminals," "racketeers," "unsavory characters" and "persons of bad reputation."

With the repeated references to "criminals," "racketeers," "unsavory characters" and "persons of bad reputation" throughout the trial as a background, the misstatements of the evidence by the Government's trial attorney in his final argument had a telling effect upon the jury, the trial court and the Court of Appeals.

The Court of Appeals, in its opinion, Appendix, *infra*, page 34, has singled out the trial court's observation concerning the impact of the Government's proof of telephone calls from Hoffa in Washington to Presser in Cleveland, and the further proof of the Petitioner seeking information "as to whether he could secure the duplicate invoices in question at a time when the original invoice had just been mutilated."

Regarding the telephone calls: The Petitioner did not at any time attempt to establish a defensive alibi. The Petitioner took the stand and candidly and honestly recounted the circumstances of Sheridan's visit to his office in September of 1958. He emphatically denied having consciously seen the documents in question at any time from 1955 until the time of trial, and denied that he mutilated either document or withheld them from Sheridan or the Committee (R. 232a).

If the documents were subject to demand by Sheridan through the subpoena referred to in the indictment, Sheridan had those documents in his possession on September 9, 1958.

Regarding the duplicate invoices: Charles S. Schaeffer testified:

> "**I called and asked** for information as to **whether he** (Mr. Feder, Deutsch Company) **had any bills or invoices** which were sold to the Teamsters Union or to Mr. Presser **and, if so, I would like to have duplicate copies of them.**"

The Government argued to the jury that Mr. Schaeffer was perhaps the Government's most important witness because it disclosed that "Presser asked Schaeffer to attempt to get him the other copies pertaining to this gift" (R. 341, 342). When Petitioner's counsel called the misconduct of the Government's trial attorney to the attention of the trial court concerning this "most important witness of the Government," the trial court was so impressed with the Government's argument that he stated (R. 327a):

> "My impression **of the cogent evidence which very likely influenced the jury was the defendant's testimony . . . To a like effect is the clear implication in Salesman Charles Schaeffer's testimony that the defendant, in September, 1958, was interested in securing the duplicate copy of the torn invoice. (Defendant's brief does not set out fully Schaeffer's testimony about trying to secure the duplicate invoice for Presser, see pages 381 and 382 of the typewritten transcript.)"**

If the trial court and the Court of Appeals were so impressed with the misstatements of the evidence by the Government's attorney in his final argument, certainly the influence the misstatements had upon the jury were equally as great as the trial court and the Court of Appeals have observed.

V.

To prove the charges made against the Petitioner the Government relied upon circumstantial evidence (R. 302a, 303a), and that evidence cannot support the conviction of guilty.

Following the service of the subpoena duces tecum demanding nine years of records of Joint Council 41 (Gov. Ex. 9, which the Petitioner contends was a nullity), the

demanded documents were turned over to an employee of the Committee at the Cleveland Field Office (R. 86a). When these documents were turned over to the Committee's Field Office Paul T. Riebesell receipted for the documents (R. 146a, 147a). However, several Government agencies or departments demanded the same documents over the same period of time (R. 146a). Both Senator McClellan (R. 25a) and Walter Sheridan (R. 86a) knew of this practice.

At the time Sheridan went to the office of Joint Council 41 on September 9, 1958 and on September 13, 1958, there was in the custody of the Committee's field office personnel the cash disbursement book of Joint Council 41 for 1955 (Gov. Ex. 23; R. 137a) and the cancelled checks with stubs of Joint Council 41 for November and December of 1955 (Gov. Ex. 24; R. 137a).

Line 7 of Government's Exhibit 23 under date of December 29, 1955, was the entry "A. R. Deutsch, $824." (R. 175a) and a reference to check "82-8302" (R. 175a).

Government's Exhibit 24 contained Check No. 8302 and the stub to that check had the notation "Rudolph Deutsch for $824 for Christmas gi[illegible]s" (R. 176a).

Despite the fact that Sheridan knew of the arrangement in existence between Joint Council 41 and Field Office (R. 86a); knew that the Field Office gave receipts for documents it received (R. 96a); and knew many receipts for Joint Council 41 were in the Field Office files (R. 96a); Sheridan did not examine any of the documents in the Field Office. Particularly, Sheridan knew nothing about Government's Exhibits 23 and 24 "on or about and between September 9, 1958 and September 13, 1958" (R. 94a).

Although Sheridan made notes (Gov. Ex. 10; R. 315a) of "all of the details" that appeared on the original of the

Deutsch invoice (Gov. Ex. 9; R. 314a) he could not recall the appearance of "this second piece of paper" (R. 68a).

Petitioner's secretary was called as a witness by the Government and testified that the Petitioner was out of town following Sheridan's visit to the office of Joint Council 41 on September 9, and the date of the Petitioner's absence was the "10th or 11th" (R. 181a). Petitioner's secretary also testified that in Petitioner's absence from his office a great number of people had access to it for their business (R. 165a).

If the Petitioner is presumed innocent of the charges in the indictment and if the presumption remains with the Petitioner until that presumption of innocence is overcome by **substantial** and **affirmative** evidence, the Government failed to exclude every other hypothesis except that of the guilt of the Petitioner.

CONCLUSION.

It must follow from the Government's failure to prove by competent evidence the Petitioner's guilt with respect to any element of the offense charged in the indictment that the Petitioner is entitled to have the subpoena duces tecum quashed, the indictment dismissed and judgment of acquittal entered on his behalf.

Respectfully submitted,

EDWIN KNACHEL,
JOHN G. CARDINAL,
ROBERT E. FREED,
Counsel for Petitioner.